IN THE

Supreme Court of the United States

No. 79-201

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.,
Petitioners,

v.

THE JUNIOR COLLEGE DISTRICT OF ST. LOUIS, ETC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

BRUCE E. WOODRUFF
THOMAS E. WACK
EDWIN S. FRYER
611 Olive Street, Suite 1950
St. Louis, Missouri 63101
(314) 621-5070
Attorneys for Respondent

Of Counsel
ARMSTRONG, TEASDALE, KRAMER & VAUGHAN

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

Citations:

Statutes:

LAW REVIEW ARTICLES

IN THE

Supreme Court of the United States

No. 79-201

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.,
Petitioners,

v.

THE JUNIOR COLLEGE DISTRICT OF ST. LOUIS, ETC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

QUESTION PRESENTED

Respondent believes HEW's statement of the issue presented for review is defective as being an abstract general statement that goes far beyond the record in this case and is too broad. The true issue in *this* lawsuit is: whether certain administrative regulations promulgated by HEW in an attempt to regulate general employment practices of educational institutions, to-wit §§86.51(a)(1) and 86.54 of 45 C.F.R., are in excess of the authority conferred upon HEW by Congress under 20 U.S.C. §§1681 and 1682 (§§901 and 902) of the Education Amendments of 1972).

Whether HEW might conceivably have the statutory authority to promulgate other, more specific regulations touching only those employment practices having a provable impact upon students is another issue for another case. HEW's so-called "infection theory" (discussed *infra*) relates to this broader issue, and has no place in the instant litigation.

ARGUMENT

I. The Numerous Federal Appellate and District Courts Which Have Previously Considered the Same Question Presented for Review by HEW Have Unanimously Rejected the Agency's Tortured Construction of Title IX.

Fully three Federal Courts of Appeal[1] and eight District Courts[2] have already carefully considered and unanimously repudiated all of the same arguments that HEW now entreats this Court to consider. Not a single Court anywhere has ruled in favor of HEW. As noted by one of the district courts confronted with HEW's contentions:

> "With a uniformity of opinion not often seen among district courts, each court which has reviewed the issue has concluded that the subject regulations are beyond the scope of the authority granted by 20 U.S.C. §§1681 *et seq.*, and are therefore invalid and unenforceable." (citations omitted).[3]

HEW argues, with a myopic disdain for judicial precedent, that its petition for certiorari herein ought to be granted because the numerous and unanimous federal judicial decisions against it on this issue have "severely disrupted" its administrative workings, (Petition,[4] p. 12) by causing it to suspend enforcement of

---

[1] See cases cited in fn. 7 on page 11 of HEW's Petition. References herein to HEW's Petition are to the Petition it filed with this Court in the companion case *Patricia Harris v. Islesboro School Committee*, No. 79-200. On page 5 of its brief in the instant case, *HEW* has incorporated by reference herein its *Islesboro* Petition.

[2] See district court cases cited in fns. 7 and 8 on pages 11 and 12 of HEW's Petition.

[3] *The University of Toledo, etc. v. HEW*, — F.Supp. —, N.D. Ohio C77-235 (1979).

[4] References herein to HEW's "Petition" are to the petition for certiorari which it filed in *Harris v. Islesboro School Committee, et al.*, No. 79-200. On page 5 of its petition in the instant case, HEW

one of its administrative regulations. Reduced to its essentials, this position is a plea for reversal on the grounds that HEW's staff should not suffer a decreased work load.[5] In fact, until very recently and in spite of Court decisions rejecting its statutory interpretation, HEW persisted in seeking to enforce the repudiated regulations against those remaining schools and colleges, ever decreasing in number, situated outside the geographical limits of the federal circuits and districts which had rejected HEW's claim of authority over sex discrimination in employment under Title IX.

There is no conflict among the circuits on the issues presented by this case. There is not even a conflict among the districts. The only conflict underlying this case is that between a bureaucracy and the federal judiciary. In at least eleven separate and well reasoned opinions, the federal courts have concluded that Congress did not intend, by §§901 and 902 of the Education Amendments of 1972, to convert HEW into the "Department of Health, Education, Welfare and Employment."

II. By Its Plain, Unambiguous Meaning, Title IX Protects Students and Not Employees

An excursion into the legislative history behind enactment of Title IX, while thoroughly supportive of Respondent's[6] position herein, is unnecessary. The clear, unequivocal meaning

---

apparently attempts to incorporate its *Islesboro* brief by reference into the instant petition. No substantive arguments are made by HEW in the instant petition, except by reference to its *Islesboro* brief.

[5] In its Petition at page 11, HEW tellingly acknowledges that it has a heavy workload of employment discrimination cases filed under the challenged regulations. HEW would have served these misguided complainants better if it had referred them to the EEOC, Department of Labor or other more appropriate agencies for processing of their employment discrimination charges.

[6] Respondent, the Junior College District of St. Louis, St. Louis County, Missouri (sometimes known as St. Louis Community College) is referred to herein as the "College".

of §§901 and 902 of Title IX is that those provisions were designed to protect students, i.e., those who participate in, study under and benefit from the federally funded educational programs and activities at a particular institution. Employees of the institution, who are only incidentally and indirectly related to the funded programs as part of the overall program delivery system, can and must look to the numerous state, local, and other federal laws and remedies for redress of sex discrimination in employment.

The federal courts which have already considered HEW's arguments have persuasively met and discredited each of them because of the plain meaning of Title IX.[7] The following points have compelled the courts unanimously to conclude that Title IX's plain meaning limits it to regulation of practices affecting the rights and freedoms of students.

A. The Exclusions From Coverage Enumerated by Congress Relate Solely to Students.

Mention of employment is not only conspicuously absent from the basic rule of Title IX (stated in §901) but also from the nine specific exceptions to the rule.[8] Not one of these exclusions pertains to or even mentions employment practices. For instance, §901(a)(1) [20 U.S.C. §1681(a)(1)], excludes coverage of admissions to vocational and higher educational institutions; (a)(2) excludes coverage of the admission to educational institutions in the process of changing from a single-sex to a co-educational admissions policy; (a)(4) excludes coverage of military academies; (a)(5) excludes coverage of admissions to educational institutions which have traditionally admitted

---

[7] See, e.g., *Brunswick School Board v. Califano*, 449 F.Supp. 866, *loc. cit.* 870 (D.Me. 1978) *affirmed* 593 F.2d 424, 426 (1st Cir. 1979).

[8] §901(a)(1) through (a)(9) [20 U.S.C. §1681(a)(1) through (a)(9) (1976)].

members of only one sex; (a)(6)(A) excludes coverage of the membership practices of fraternities and sororities; (a)(6)(B) excludes coverage of the membership practices of the YMCA, YWCA, the Boy Scouts, Campfire Girls, and other youth service organizations which have traditionally limited their membership to one sex. Not a single one has anything to do with employment practices. As the court stated in the *Romeo* decision:

> "This can be explained in only one of two ways: either Congress meant to allow wide open coverage of employment practices under §1681 while closely regulating §1681 coverage in all other respects, or, and what appears more likely, Congress never meant to include employment practices within the coverage of §1681 in the first place.[9]

B. **The Ultimate Sanction in the Event of a Violation of Title IX Is Termination of Aid to the Affected Program, A Sanction Which Has No Logical Relation to the Correction of Unlawful Employment Practices.**

Section 902[10] imposes the sanction of "termination of or refusal to grant or to continue assistance under such program or activity" upon the guilty recipient. Termination of federal aid to the offending program or activity is logically related only to discrimination against students, since it reflects a congressional balancing of costs against benefits. Congress has evidently determined that a program or activity conducted in such a way as to be discriminatory against students is worse than no program or activity at all. But in the case of employment discrimination, such a termination would be of limited enforcement value and has little or no justification since the funds are provided to create programs and activities for students.

---

[9] *Romeo Community Schools v. HEW*, 438 F.Supp. 1021 *loc. cit.* 1032 (E.D.Mich. 1977), *affirmed* — F2d — (6th Cir. 1979).

[10] 20 U.S.C. §1682 (1976).

A termination of program funding because of employment discrimination would constitute unjustifiable punishment of students, particularly when there are more logical means (such as the Equal Pay Act,[11] and the EEO Amendments of 1972,[12] enacted contemporaneously with Title IX so as to provide coverage of employment practices of educational institutions) to correct employment discrimination in educational institutions without working such a severe hardship on students. As Judge Sharp noted in the *Seattle* case:[13]

> "Punishment of students in the affected programs is a particularly anomalous result since the sanction is not being imposed for the purpose of enforcing *their* rights. An ironic result of the imposition of this sanction is that with the program's funding cut off, the teachers and other employees who staff the program may be laid off. Since it is doubtful that Congress intended to resort to such an arbitrary enforcement measure to protect employee rights, it is similarly doubtful that Congress intended by §1681 to protect employees at all."[14]

Imposition of aid termination as a sanction will not necessarily compel a delinquent college to modify or eliminate its discriminatory employment practices, but it will penalize the students involved or enrolled in the affected programs. For instance, a termination of aid to a freshman nursing student at one of the respondent's campuses is hardly an appropriate remedy for discrimination against a dean at another campus who alleges she was denied a promotion because of her sex. Termination of funds being spent for the benefit of students

---

[11] The Equal Pay Act of 1963, 29 U.S.C. §§ 206 *et seq.* (as amended, 1974).

[12] 42 U.S.C. §2000e (1972).

[13] *Seattle University v. HEW*, 16 E.P.D. ¶5243 (W.D. Wash. 1978).

[14] 16 E.P.D. *loc. cit.* ¶5245. (Emphasis in the original text.)

because of alleged discrimination in employment serves only to deprive innocent beneficiaries of the educational services that Congress intended them to have, without remedying the discrimination suffered by the employee. The most equitable remedies for the college dean are promotion and back pay, both of which would be available in the proper case under Title VII,[15] the Equal Pay Act,[16] and Missouri state laws[17] regulating employment discrimination.

Title VII of the Civil Rights Act of 1964, at §2000e-5, permits the Equal Employment Opportunity Commission (or in the case of a public educational institution, the Attorney General), to prosecute a civil action against the offending educational institution and to secure in such litigation an injunction against any further employment discrimination, and also to obtain promotions, reinstatement and back pay for all injured parties. Such forms of relief are more logically related to employment discrimination than the Title IX remedy, inflict less injury upon students, and are at least as effective a means to prevent taxpayers' funds from being used to support sex discrimination in employment.

C. Title IX Is "Program Specific"; Subpart E Is Not.

There is a further express statutory limitation on HEW's power to promulgate and enforce regulations under Title IX. Section 902[18] makes Title IX "program specific." HEW is prohibited by §902 from terminating financial assistance to all programs in a college's curriculum because of noncompliance in some. Thus, HEW must determine the appropriateness

---

[15] 42 U.S.C. §2000e (1976).

[16] 29 U.S.C. §§206 *et seq.* (1976).

[17] Chapter 296, R.S.Mo.

[18] 20 U.S.C. §1682 (1976).

of a termination under §901 on a "program-by-program" basis.[19]

HEW contended in *Board of Public Instruction of Taylor County, Florida v. Finch*,[20] that the term "program" in §601 of Title VI of the Civil Rights Act of 1964[21] referred to general categories, such as an entire school program. The language of §601 is virtually identical to §901 of Title IX. The Fifth Circuit decisively rejected HEW's expansive meaning of the word "program," holding that the legislative history of Title VI indicated that §601 covered particular grant statutes and did not refer to a collective concept known as "a school program."

In *Taylor County*, HEW had not first adminstratively determined whether discrimination actually existed in the federally assisted programs in the school district before terminating federal assistance.[22] The Court indicated that this approach was unacceptable, noting that the "pinpoint" provision sought to protect the innocent beneficiaries of and participants in programs not tainted by discrimination, and that limiting the scope of the termination power to the particular program was integral to the legislative scheme.[23]

By its very nature, employment discrimination cannot be addressed on a program-by-program basis. As noted by Judge Feikens in *Romeo*:[24]

> "Regulation of employment practices is inherently non-'program-specific.' An educational institution's employ-

---

[19] *Romeo*, 438 F.Supp. at 1033, affirmed — F2d — (6th Cir. (1979).

[20] 414 F.2d 1068 (5th Cir. 1969).

[21] 42 U.S.C. §2000d (1964); Title VI pertains to race discrimination while Title IX concerns sex. Otherwise the language of §601 of Title VI and §901 of Title IX are identical.

[22] 414 F.2d at 1070-72.

[23] *Id.* at 1075-76.

[24] 438 F.Supp. at 1033, *affirmed* — F2d — (6th Cir. 1979).

ment policies are general in nature, covering, by and large, all faculty employees involved in all of an institution's education programs, whether federally funded or not. Regulation of those policies by HEW will therefore necessarily entail the regulation of employment practices unrelated to the particular programs funded by the federal government and without regard to whether such practices result in sex discrimination against the beneficiaries of those programs."

In the instant case, HEW proffered a standard form of "Conciliation Agreement" making demands which are college-wide and thus inherently non-program specific.[25] Acceptance of HEW's "Conciliation Agreement" would have required the College to undertake a comprehensive evaluation of its employment practices and possibly to submit to a "college-wide" back pay remedy even though the extent of its federally assisted programs to students comprise only 2% of its total budget.

The words "program or activity" must mean only that which is authorized by and funded under federal education grant statutes. As noted by Judge Sharp in *Seattle*:

> "The words [program or activity] do not refer to the entire operation of the recipient institution but only to the federally funded programs operated by such institution.[26]

Under Subpart E[27] of HEW's regulations, however, the threshold question is whether any program or activity of an educa-

---

[25] Paragraphs 7 and 8 of the "Conciliation Agreement" would require the College to analyze the salaries of every employee of the College at all of its campuses, and in all of its programs (whether federally assisted or not), by sex and job titles, compute averages examine employees' personnel files, and to agree in advance to the possible payment of back pay.

[26] 16 E.P.D. at ¶5245.

[27] Subpart E of HEW's Regulations (45 C.F.R. Part 86) purports to deal with the general subject of employment discrimination. The regulations which are the subject of this litigation, §§86.51(a)(1) and 86.54, are part of Subpart E.

tional institution is federally assisted. If the institution receives any federal funds, even to a single program, then HEW can, in its view, regulate *all* employment practices in *all* programs operated by the institution. This interpretation, reflected in the "college-wide" provisions of the "Conciliation Agreement" flies in the face of §902. The fact that employment discrimination is inherently non-program specific confirms that §§901 and 902 simply have nothing to do with employment practices.

D. HEW'S Assertion That the Eleven Lower Federal Courts Which Have Considered This Legal Issue Have "Unduly Focused on Only One of 901's Prohibitions" Is Erroneous.

Section 901 states that no person may "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" federally assisted programs or activities maintained by an educational institution. The courts have unanimously found and concluded that this language was designed to protect students—i.e., those who *participate in, study under or benefit from* the programs and activities at a particular institution—not the employees of the institution. Thus, the janitor who cleans a classroom used by students in a particular federally funded program or the engineer who services the heating, ventilation and air conditioning in the lab are only incidentally and indirectly related to the funded program and are not covered by §901. They are merely one part of the overall program delivery system. Clearly, they do not participate in or benefit from these programs except in the most indirect and incidental sense.

HEW erroneously asserts that lower courts have unduly focused on the "denied the benefits of" prohibition in §901. Judge Nangle's analysis of §901 in the instant case most certainly covered all prohibitions of the statute.[28] So did Judge Sharp in the *Seattle* case.[29] So did Judge Feikens in *Romeo*:

---

[28] *See*, 455 F.Supp. 1213, *loc. cit.* 1214-1215.

[29] 16 E.P.D. ¶5243, *loc. cit.* 5244.

"Teachers *participate* in these programs only to the extent that they may teach and help administer some of them; teachers *benefit* from these programs only to the extent that the funds for them may be used to pay their salaries; teachers are 'subjected to discrimination *under*' these programs (emphasis added) only to the extent that the programs themselves may be established and operated in an employment-related discriminatory way . . . when Congress means to statutorily regulate employment discrimination, it uniformly does so in more explicit terms than this.[30]

E. The Ready Availability of Other Remedies to Redress Employment Discrimination (Such as Under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act) Militate Against an Unwarranted Expansion of Title IX.

In 1972, the Equal Employment Opportunity Amendments brought educational institutions and their employees within the protection of Title VII. The individual complainant who filed the charge with HEW resulting in this lawsuit was entitled to pursue her claim with the Equal Employment Opportunity Commission under Title VII, with the Department of Labor under the federal Equal Pay Act, and with the Missouri Commission on Human Rights pursuant to state law. With such a panoply of forms of relief available not only to her, but to the federal government[31] and all other employees of educational institutions as well, it becomes wholly unnecessary, if not judicially unwise, to stretch the meaning of Title IX so as to encompass employment discrimination.

It is worthy of note that Congress has always recognized the special expertise of the EEOC and the Labor Department in

---

[30] 438 F.Supp. at 1031-1032.

[31] Sections 2000e(5) and 2000e(6) of Title 42 U.S.C. empower the Attorney General to bring a civil action to remedy unlawful employment discrimination in education.

employment practices matters. These agencies have significantly greater investigative and enforcement machinery than HEW in regard to preventing unlawful employment discrimination in educational employment. By contrast, HEW is armed only with the "funds termination" sledgehammer of Title IX.

F. The Court, and Not HEW, Is the Final Authority on Issues of Statutory Construction.

HEW engages in bootstrapping when it argues that its interpretation of Title IX as covering employment discrimination is entitled to be "accorded great weight." This rule of construction is applicable only when the administrative regulations are reasonable and conform to the language of the enabling statutes.[32] Whether the regulations conform to the language of enabling statutes involves statutory construction, and as this Court has stated:

"The courts are the final authorities on issues of statutory construction . . . and 'are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate, or that frustrate the Congressional policy underlying a statute.' " [citation omitted][33]

The construction of a statute is a legal function and judicial construction must prevail over contrary administrative interpretations.

G. HEW's "Infection Theory" Is Inapplicable Either to This Particular Case or to the Specific Administrative Regulations Here Under Scrutiny.

---

[32] *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973); *Weir v. United States*, 310 F.2d 149 (8th Cir. 1962).

[33] 411 U.S. 726, 745-46 (1973).

In many if not all of the companion cases at the district and appellate level, HEW has attempted to argue that it is entitled to prevail on the merits in these disputes because, it claims, it has authority to regulate employment practices in cases where such unlawful practices "infect" a school system's admissions practices or curricula to such an extent as to constitute sex discrimination against students. The typical argument is where an institution's refusal to hire female career counselors results in foreclosure of certain careers to female students by virtue of the male counselors' discrimination against female student career advisees.

Whether HEW has authority to regulate employment practices that directly infect education policies against students is an entirely different matter than the issue presented in this case. As a matter of fact, the specific administrative regulations here under scrutiny do not specify that a particular employment practice must result in sex discrimination against students in a federally aided program before HEW may terminate aid to such program. Therefore, the "infection theory" has no relevance to this case.

The administrative regulations which are at issue here, sections 86.51(a)(1) and 86.54, are blanket prohibitions and are "program blind." Nowhere in the entire Subpart E does it appear that HEW considers itself under any obligation whatsoever to establish any resulting student discrimination as a prerequisite to a termination of funds. This is fatal to HEW's "infection theory," and prompted Judge Feikens to state in *Romeo*:

> "[T]he regulations must be judged as written. The Court has neither the power nor the inclination to rewrite these regulations by construing their coverage of employment practices as reaching only situations where sex discrimination against students in affected programs has resulted. Defendant's Subpart E regulations are plainly focused on

> employment practices *per se*. To judicially engraft onto each of them an implicit requirement of infection would not merely provide a saving limitation on their coverage, it would substantially alter their meaning and effect."[34]

III. Even Though Unnecessary to Disposition of This Case Against HEW, a Review of Relevant Legislative History Clearly Reveals That Title IX Was Meant to Protect Students Only, and Not Employees.

A. HEW Has Taken Out of Context and Totally Misinterpreted the Remarks of Senator Bayh.

An early version of the bill which was ultimately to become Title IX (herein referred to for convenience as the "February 28, 1972 version") contained an amendment to Title VII of the Civil Rights Act of 1964[35] and the Equal Pay Act of 1963.[36] One section of the February 28, 1972 version[37] would have made Title VII of the Civil Rights Act of 1964 applicable to public and private educational institutions, giving the EEOC administrative and enforcement authority with respect to such matters, and the other[38] had essentially the same effect upon the Equal Pay Act, giving administrative and enforcement authority to the Department of Labor, Wage and Hour Division. Neither section would have conferred any authority

---

[34] *Romeo*, 438 F.Supp. at 1035.

[35] 42 U.S.C. §2000e (1964).

[36] Equal Pay Act of 1963, 29 U.S.C. §§206 *et seq.* (1963).

[37] § 1005. *See*, 118 Cong. Rec. 5803, 5808 (1972). The Amendment was originally to be known as "Title X", with sections numbered §1001 *et seq.* When it became Title IX, the first digit of the section numbers was changed accordingly. *See*, Janet Kuhn, *TITLE IX: EMPLOYMENT AND ATHLETICS ARE OUTSIDE HEW'S JURISDICTION*, 65 Geo. L. Rev. 49 (1976) [herein referred to as *"Kuhn"*], *loc. cit.* 56 at fn. 38.

[38] §§ 1009 and 1010. *See*, 118 Cong. Rec. 5803, 5808 (1972).

upon HEW regarding employment practices in educational institutions. Senator Bayh had inserted the Title VII amendment in the February 28, 1972 version because the fate in conference of another bill,[39] which would have similarly amended Title VII, was uncertain.[40]

The February 28, 1972 version was divided into three major subject areas: Student Admissions, Student Scholarships and Employment Practices. Sections 1001-1004 pertained to student admissions and scholarships and §§1005, 1009 and 1010 concerned employment practices. All of Senator Bayh's comments relied upon by HEW were made on February 28, 1972. Each such comment pertained to the February 28, 1972 version[41] and each was directed at the employment practices sections of the Amendment, not the student practices sections.

---

[39] *See* H.R. 7248, §§1006, 1008, 92d. Cong., 1st Sess. (1971) (extending coverage of title VII of the Civil Rights Act of 1964 to previously exempt educational agencies and institutions); H.R. REP. NO. 554, 92nd Cong., 1st Sess. 51, 108 (1971). Ultimately, the Equal Employment Opportunity Act of 1972 amended title VII, because it passed prior to the Education Amendments of 1972. *See* Equal Employment Opportunity Act of 1972, §3, 42 U.S.C. §2000e-1 (Sup. IV, 1974), *amending* 42 U.S.C. §2000e-1 (1970). Accordingly, §1005 of Title IX was deleted before enactment as unnecessary. The Equal Employment Opportunity Commission, not HEW, administers title VII. 42 U.S.C. §2000e-5(a) (Supp. IV, 1974), *amending* 42 U.S.C. §§2000e-5(a), (b) (1970). Section 906 also repealed the exemption for executive, administrative, and professional personnel previously contained in the Equal Pay Act of 1963, which is administered by the Department of Labor. *See* 29 U.S.C. §213 (Supp. IV, 1974), amending 29 U.S.C. §213 (1970). Both the Equal Pay Act of 1963 and title VII of the Civil Rights Act of 1964 clearly prohibit sex discrimination in employment, but neither law confers jurisdiction for enforcement on HEW, and neither provides for terminating aid to students as a remedy for discrimination against employees. [Verbatim from *Kuhn,* p. 57 fn. 47].

[40] 118 Cong. Rec. 5807 (1972). See *Kuhn loc. cit.* 61 at fn. 75.

[41] See the full text of Title IX as it read on February 28, 1972, and Senator Bayh's comments directed thereto. 118 Cong. Rec. pp. 5802-5815 (February 28, 1972).

None of his comments quoted by HEW has any relevance to §§901 and 902,[42] which are the subject matter of this litigation, and accordingly HEW's entire "legislative history" argument must fail.

As succinctly and accurately stated by Judge Gignoux in the *Brunswick* case:

> "Nor do Senator Bayh's remarks support defendants' position. Amendment No. 874, to which Senator Bayh referred, was the original draft of Title IX, which included both § 901 and the Title VII and Equal Pay Act amendments. It is apparent that his remarks, as well as his synopsis of Title IX, insofar as they pertained to employment discrimination, can only reasonably be understood as alluding to the Title VII and Equal Pay Act amendments, and not to § 901."[43]

HEW quotes four remarks of Senator Bayh, made on the floor of the Senate during the February 28, 1972 debates over Title IX. The following illustrates HEW's misinterpreation of those remarks:

1. **"In the Area of Employment We Permit No Exceptions."**

At page 14 of its Petition HEW attempts to rebut the lower courts' finding that one of the facts evidencing Congress' intent to limit §901 to students is that §902's exceptions to §901's coverage deal exclusively with students.

When Senator Bayh states "in the area of employment we permit no exceptions" he was not referring to the coverage excep-

---

[42] Formerly §§1001 and 1002. [118 Cong. Rec. 5803, 5808 (1972)].

[43] *Brunswick School Board v. Califano,* 449 F.Supp. 866, 873 (D.Me. 1978), affirmed 593 F2d 424 (1st Cir. 1979).

tions enumerated in §902. In fact, to the contrary, when he was discussing §§901 and 902 (then §§1001 and 1002) he stated "My amendment allows some exemptions." The quotation relied upon by HEW addresses itself to the sections of Title IX which had been proposed to amend Title VII and the Equal Pay Act.[44]

Quoted within its proper context, the "no exceptions" remark of Senator Bayh reads as follows:

> "[W]e are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrminaton of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.
> In the area of employment, we permit no exceptions."[45]

HEW has greatly distorted the Bayh quotation upon which they rely by taking it out of its context. This distortion did not elude the First Circuit Court of Appeals:

> "A fair reading both of the colloquy above, as well as the discussion immediately preceding and following the above-quoted passage, indicates that Senator Bayh divided his analysis into three sections, two of which were specifically aimed at students (admissions and services), the third at employees (employment). While Senator Bayh's response was more extended than it needed to be for a direct answer to Senator Pell's question, we think HEW's reading is strained."[46]

---

[44] 118 Cong. Rec. 5812 (1972).

[45] *Ibid.*

[46] *Islesboro School Committee, et al. v. Califano,* 593 F.2d 424, 427 (1st Cir. 1979).

2. "Those Women Who Choose to Make Education Their Life's Work."

Senator Bayh's statement with repsect to "those women who choose to make education their life's work" clearly refers to the then existing employment provisions in Title IX: §§1005 and 1009-1010.[47] The remark was made in the following context:

> "I believe it is important to survey in some detail the scope of the problem in certain fundamental areas—hiring, scholarships, and admisions.
>
> A. DISCRIMINATION IN HIRING AND PROMOTION OF FACULTY AND ADMINISTRATORS.
>
> Discrimination against females on faculties and in administration is well documented and widespread abuse is clear. I have been dismayed to learn of the double standard the academic community has applied to those women who choose to make education their life's work."[48]

Subdivisions (B) and (C) of Senator Bayh's overall summary of Amendment 874 are encaptioned "Discrimination in Scholarships" and "Discrimination in Admissions", respectively. On the other hand, an examination of §§901 and 902, which are the subject of *this* litigation, clearly and expressly relate solely to admissions and scholarships. The word "employment" is not mentioned anywhere in these sections.

3. "The Amendment Is Designed to Expand Some of Our Basic Civil Rights and Labor Laws to Prohibit Discrimination Against Women."

On page 15 of its Petition, HEW attempts to seek support for its position from Senator Bayh's statement that the "Amendment

---

[47] 118 Cong. Rec. 5804-5805 (1972).

[48] *Ibid.*

is designed to expand some of our basic civil rights and labor laws". But, when Senator Bayh referred to "the Amendment" in his remarks of February 28, 1972, he was speaking of the entire "Amendment 874" which, on the date of his remarks, included §§ 1005 (amending Title VII) and 1009-1010 (amending the Equal Pay Act).[49]

4. "This Portion of My Amendment Covers Discrimination . . . In . . . Employment."

At page 16 of HEW's Petition, it relies upon the fact that Senator Bayh's comment "this portion of my amendment covers discrimination . . . in . . . employment" was made during his analysis of §§ 1001 through 1004 (enacted as §§ 901 through 904) of the Amendment. Clearly this lone non-sequitur in the legislative history resulted from a momentary lapse in thinking on Senator Bayh's part. It is the only statement in the entire legislative history which seems to support HEW's position, and it runs directly contrary to all of the other statements and testimony of witnesses. The First Circuit Court of Appeals explained Senator Bayh's apparent lapse in thinking as follows:

> "While it is true that there were occasional lapses during the discussions, wherein one of the senators would telescope the sections, thereby suggesting that employment was to be covered under the basic provisions of Title IX, a careful examination of the debates had lead us to conclude that these were the products of the imprecision of oral discussion rather than a reflection that the Act intended § 901 of Title IX to embrace prohibitions against sex discrimination in employment. This was reserved for the amended Title VII and Equal Pay Act.[50]

---

[49] In context, Senator Bayh's references to "My Amendment" or "This Amendment" can be seen to refer to all three general subject areas thereof, namely, employment, admissions and scholarships. See, e.g., 118 Cong. Rec. *loc. cit.* 5803, 5804, 5806-5808.

[50] *Islesboro School Committee, et al. v. Califano, et al.*, 593 F.2d 424, 428 (1st Cir. 1979).

Tellingly, HEW acknowledges (albeit with a whisper in a footnote of their Petition)[51] the existence of imprecision and inaccuracy in the very same section of Senator Bayh's comments. Specifically, Senator Bayh inadvertantly stated that Part A of his summary of the Amendment addressed itself to § 1001 through 1005. Undoubtedly, he meant to say 1001 through 1004, since 1005, an employment practices section, was the section which would have amended Title VII of the Civil Rights Act.

With no doubt some degree of chagrin, HEW asks this Court to view Senator Bayh's mistaken section reference as a product of the imprecision of oral discussion. But his mistaken reference to employment practices in the same portion of his summary, HEW would argue, is really no mistake at all. The fact of the matter is that both statements were the product of the imprecision of oral discussion, and neither should be relied upon by this Court as an expression of what Senator Bayh actually intended to say.

B. The Testimony of All Other Witnesses During the Legislative Process Confirms That It Was the Title VII and Equal Pay Act Sections of Title IX Which Prohibited Employment Discrimination and Not § 901.

That it was the Title VII and Equal Pay Act sections of Title IX that prohibited discriminatory employment practices and not the § 901 language was clear from the very beginning of the legislative development of Title IX. During the Title IX legislative hearings,[52] the major focus was the employment dis-

---

[51] Petition, pp. 16 & 17, fn. 13.

[52] *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm .on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *House Title IX Hearings*]. H.R. 16098 was re-introduced in the Ninety-Second

crimination portion of the legislation, not the § 901-type language protecting students. Without exception, every witness who testified about employment discrimination did so with specific reference to the employment provisions of the bill, i.e., the Title VII and Equal Pay Act amendments.[53] Similarly, every witness who discussed the § 901 Title VI language, including the witness for HEW, did so in the context of protecting the student beneficiaries of specific federal programs.[54]

Not one witness—including those for the executive branch—related the § 901 language to employment. On the contrary, the Assistant Attorney General, Civil Rights Division, testified that the Justice Department opposed the legislation in the form then under consideration, and suggested an alternative which would have provided for HEW jurisdiction over employment practices.[55] The first section of the administration proposal was virtually identical to § 901 as enacted, and which protects the beneficiaries of federal assistance. To protect employees against discrimination, however, the Justice Department's version provided an additional subsection prohibiting employment discrimination by "recipients of Federal financial assistance",[56] a prohibition to be enforced by HEW using the threat of fund terminations. This version, which was not adopted, did not include the provisions amending Title VII and the Equal Pay Act, and would, therefore, have conferred all Title IX employment jurisdiction on HEW. The specific employment coverage provided in the proposed new subsection, moreover, reflected

---

Congress as H.R. 7248, the House version of what eventually was enacted as the "Education Amendments of 1972". It was subsection 805(a) of H.R. 16098 that would have amended Title VI to include the word "sex"; this subsection later became section 901 of Title IX.

[53] For examples of such testimony, *see id.* at 8-9, 27, 79, 128, 159, 304-06, 379.

[54] *Id.* at 210-11, 305-06, 379, 750.

[55] *Id.* at 678-90.

[56] *Id.* at 690-91.

the consistent executive branch interpretations of the "no person" language found in § 901 as *not* including coverage of employees. Thus, the administration's version of Title IX presented the Congress with a clear choice as to which agencies should enforce Title IX's employment provisions—and the HEW version lost.

C. The Language of and Legislative History Behind Title VI of the Civil Rights Act of 1964 Supports the College's Position in This Case.

Sections 901 and 902 of Title IX were derived from the virtually identical language of Title VI of the Civil Rights Act of 1964, which prohibits *race* discrimination in federally assisted programs.[57]

That the scope of authority conferred on HEW by the two statutes is the same is not disputed by HEW:

> [I]n setting up an identical administrative structure and employing virtually identical statutory language, Congress clearly intended that the scope of [HEW's] authority to issue regulations should be the same under Title IX as under Title VI.[58]

Because the decision in this case must rest on the meaning of the statutory language, the discussion herein of the legislative

---

[57] 42 U.S.C. §2000d (1976). Sections 602 and 603 of Title VI are absolutely identical to §§902 and 903 of Title IX; §601 is almost identical except that it prohibits discrimination based on "race, color or national origin", whereas §901 prohibits discrimination based on sex.

[58] *Points and Authorities in Support of Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment* at 21, filed by HEW in *Romeo Community Schools v. U.S. Department of Health, Education and Welfare*, 438 F.Supp. 1021 (E.D.Mich. 1977).

history of Title IX will incorporate relevant portions of the legislative history of Title VI.[59]

Unlike Title VI which protects only the beneficiaries of federally assisted programs, the February 28, 1972 version of Title IX included separate provisions, discussed above, which would have specifically prohibited sex discrimination in employment. This protection was not limited to employees in federally assisted programs but extended to all employees in educational institutions, irrespective of the receipt of federal aid. As mentioned above, these provisions did not, however, authorize enforcement by HEW, nor did they authorize the termination of aid which is supporting needed educational services for students as a remedy for discrimination against employees.

In view of the virtual identity of § 601 of Title VI and § 901 of Title IX, the first question to be addressed herein is whether § 601 of Title VI protects employees as well as students. In the original version of the bill which became the Civil Rights Act of 1964, § 601 of Title VI did contain language prohibiting employment discrimination in connection with federally assisted programs.[60] An early revision, however, resulted in the removal of the employment language from Title VI and the addition to the bill of an expanded and strengthened new Title VII, which incorporated the provisions of the equal employment opportunity legislation previously reported by the House Committee on Education and Labor.[61]

---

[59] The first House version of Title IX provided for a simple amendment to Title VI that would have included the word "sex" after the words, "race, color". H.R. 16098 §805(a), 91st Cong., 1st Sess. (1969).

[60] H.R. 7152, 88th Cong., 1st Sess. (1963).

[61] H.R. 405, 88th Cong., 1st Sess.; H.R. Rep. No. 570, 88th Cong., 1st Sess at 198 (1963).

The new version of Title VI afforded protection only to the beneficiaries of federal programs and did not extend to those employed as part of the delivery system of such programs to the students. All provisions relating to employment were to be found in the expanded Title VII, a fact frequently noted during hearings on the bill.[62] During hearings before the House Rules Committee, for example, Chairman Celler, the House sponsor of the bill, was asked whether Title VI would apply to discrimination against an applicant for employment in connection with a federally assisted program. He replied that such discrimination "has nothing to do with title 6. That would come under FEPC".[63] The Justice Department agreed. In a letter to Senator Cooper, Attorney General Kennedy responded to a specific question on this point:

> 3. *Question.* Would section 602 cover an employee who receives funds under a Federal program, and who discriminates in his employment practices? *Answer.* Generally no. Title VI is limited in application to instances of *discrimination against the beneficiaries* of Federal assistance programs, as the language of section 601 *clearly* indicates. (Emphasis added.)[64]

The fact that the "no person" language of § 601 did not cover employment practices except in programs intended to create employment (*i.e.*, wherein "beneficiaries" and "employees" are one and the same) was emphasized again and again. Title VII, not Title VI, was intended to prohibit discriminatory employment practices. During House debate, it was noted that not even

---

[62] *See, e.g., Hearings on S.1731 and S.1750 Before the Senate Comm. on the Judiciary,* 88th Cong., 1st Sess. at 327-28, 331, 335 (1963) hereinafter cited as *Senate Judiciary Committee Hearings*].

[63] *Hearings on H.R. 7152 Before the House Comm. on Rules,* 88th Cong., 2d Sess. at 198 (1964).

[64] 110 Cong. Rec. 10076 (1964).

a violation of "Title VII would have any bearing on payments covered by Title VI".[65]

To avoid any possible confusion as to whether the text of § 601 of Title VI, essentially identical to § 901 of Title IX here at issue, was intended to include employees as well as beneficiaries, a revision which was ultimately enacted included the following new section:

> [Sec. 604.] Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.[66]

In discussing the revision, the Senate floor leader pointed out that he and the other authors had "made a number of points clearer and more specific. [W]e have expressed in specific legislative language what has always been intended."[67] As noted by the floor leader, §604 was intended simply to re-state what §601 already said; it was in no way intended to alter the meaning thereof: "This provision . . . serves to spell out more precisely the declared scope of coverage of the title."[68] Thus, the "no person" language appearing in §601 of Title VI and §901 of Title IX never did and does not now encompass persons employed by the recipients which operate the federally assisted programs.

The foresight reflected by §604 proved useful within a relatively short time. In 1966, the Department of Labor sought to exact assurances of nondiscrimination in employment from

---

[65] *Id.* at 1602 (remarks of Congressman Mathias).

[66] 42 U.S.C. §2000d-3 (1976).

[67] 110 Cong. Rec. 12707 (1964) (remarks of Senator Humphrey).

[68] *Id.* at 12720.

recipients under its programs of federal financial assistance whether or not the purpose of such financial assistance was to provide employment.[69] In response to a request for the Justice Department's comments on this effort, the Attorney General replied:

> The first question is whether imposition by executive action of equal employment opportunity conditions on all federal assistance agreements would conflict with the Civil Rights Act of 1964. Title VI of that Act, which seeks generally to assure equal and non-discriminatory treatment *among the beneficiaries of federal assistance programs*, expressly provides in section 604 that such title *does not touch employment practices in the assisted activities* except in limited circumstances. (Emphasis added.)[70]

A Justice Department memorandum enclosed with the Attorney General's letter noted that:

> Title VI provides that no person shall be excluded . . . from participation in the *benefits* of any program or activity receiving Federal financial assistance *but does not authorize any action with respect to employment practices* except where a primary objective of the Federal financial assistance is to provide employment. (Emphasis added.)[71]

The memo continues:

> Title VI . . . generally prohibit(s) recipients of assistance *from discriminating among beneficiaries* of the programs

---

[69] All that time, many recipients of federal aid were agencies of local government which were then exempt from Title VII, hence the motivation to "reach" their employment practices by other means. The exemption for such local government agencies, such as the College in this case, was repealed in 1972.

[70] Letter from the Attorney General and Enclosed Justice Department Memorandum, reproduced at Appendix A, attached hereto.

[71] *Id.* at 2 n. 2.

involved. As noted above, Section 604 of that title declares that the title *does not reach employment practices* of a recipient unless a primary objective of the assistance is to provide employment. This shows that Congress by Title VI sought, in general, *to impose nondiscrimination only with respect to beneficiaries of federal assistance programs, not with respect to those employed by recipients in making available the benefits thus financed.* (Emphasis added.)[72]

Viewing the identical authority conferred by Titles VI and IX in the context of federal education statutes, it is clear that neither authorizes HEW to regulate the employment policies of educational agencies. "Beneficiaries" of the Vocational Education Act,[73] for example, are the students eligible for enrollment in such programs. Teachers and other personnel, on the other hand, are not the "beneficiaries" of such programs, but are "those employed by recipients in making available the benefits thus financed", a fact equally true under Title IX as under Title VI.

Moreover, that employment is not covered by the "no person" language is the true "contemporaneous executive branch construction" of the relevant language, a construction which, as noted, *supra*,[74] remained unchanged throughout the pendency of Title IX in the Congress. It was not until 1975, three years after the enactment of Title IX, that HEW came out publicly with its new "contemporaneaous" constructions.

A principal argument in support of HEW's assertion of employment jurisdiction under Title IX apparently relates to the fact that section "904"[75] of the House version of Title IX was

---

[72] *Id.* at 3.

[73] 20 U.S.C. §§1241-1391 (1976).

[74] *See* notes 54-56, *supra*, and accompanying text.

[75] H.R. 7248, 92d Cong., 1st Sess. (1971). For clarity, the section numbers herein are keyed to the eventual number, *i.e.*, IX, which the sex discrimination title of the Education Amendments was assigned. When the bill was reported from the House Committee on Education and Labor, the title was designated X; thus, at that time the sections were numbered 1001, 1002 and so on.

eliminated from the bill prior to enactment. Section 904 was identical to §604 of Title VI of the Civil Rights Act of 1964:

> Sec. [904]. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.[76]

This language notwithstanding, of course, explicit authority to regulate employment did exist in Title IX—but not in §§901 and 902; this authority, moreover, was not conferred on HEW, but on the EEOC and the Department of Labor. As passed by both Houses of Congress, section "906" of Title IX provided for extending the coverage of Title VII to educational agencies and institutions, which had previously been exempt.[77] Title VII is administered not by HEW, but by the EEOC. Section "908" provided for repeal of the exemption covering teachers previously contained in the Equal Pay Act, then administered by the Department of Labor.[78] Section "904", however, provided that "nothing" in Title IX shall be construed to authorize any agency to take action with respect to employment practices —but §§906 and 908 of that Title *did* authorize such action. Thus, the deletion of section "904" was needed in order to accommodate the employment provisions of the title and thus to assure internal consistency in the final legislation.[79]

---

[76] H.R. 7248, 92d Cong., 1st Sess. (1971).

[77] *See* H.R. 7248 and H.R. Rep. No. 92-554, to accompany H.R. 7248, 92d Cong., 1st Sess. at 51, 108 (1971).

[78] *Id.*

[79] According to the rules governing conference committee action, the most convenient technical method of eliminating the inconsistency was for the House to "recede". *See generally, Jefferson's Manual, Rules of the House of Representatives* at §§539 *et seq.*

CONCLUSION

There is no reason why this Court should grant the writ of certiorari filed by petitioner herein. The decision of the Eighth Circuit Court of Appeals is absolutely consistent and in no way in conflict with the other two United States Court of Appeals decisions on the identical issues as those herein presented by petitioners.

Eleven different courts have ruled against HEW. Not a single court has ruled in its favor. For all of the foregoing reasons, the College respectfully requests the Court to deny petitioners' writ of certiorari.

Respectfully submitted,

BRUCE E. WOODRUFF
THOMAS E. WACK
EDWIN S. FRYER
611 Olive Street, Suite 1950
St. Louis, Missouri 63101
(314) 621-5070
Attorneys for Respondent

Of Counsel:

ARMSTRONG, TEASDALE,
KRAMER & VAUGHAN

September 26, 1979

APPENDIX

Office of the Attorney General
Washington, D. C.

Honorable W. Willard Wirtz
Secretary of Labor.
Washington, D. C. 20210

Dear Bill:

This is in further response to your letter to Nick Katzenbach of September 9, 1966, requesting our comments on the draft Department of Labor regulations contemplated for issuance under the authority of Executive Order 11246, which requires equal employment opportunities on Government contracts. The draft regulations would apply that order to federal statutory grant and other assistance agreements.

As you know, your letter resulted in a number of meetings and an exchange of memoranda between our staffs. These memoranda discussed various considerations favoring and opposing the contemplated regulations, and also considered whether their objective might be achieved instead by amendment of the Executive order.

Upon reviewing these discussions and after additional study, it is my opinion that issuance of the regulations would not be an appropriate method for requiring equal employment opportunity in activities under federal assistance agreements. As to alternative methods for achieving this important and worthwhile step toward the national goal of equal opportunity for all, the real choice lies between an extension of the Executive order to federal assistance agreements, and new legislation to that effect.

Historically, Executive order 11246 and its predecessors have always been understood as applying to Government contracts for supplies and services and not to federal grants or other kinds of federal assistance. While the

APPENDIX A

order's phrase "every Government contract" is very broad, its coverage has not extended beyond that of binding agreements which the Government may make for the purpose of obtaining or disposing of any goods or services or other things of value -- in other words, any procurement, commercial, or other essentially business-type transaction. It would not only be novel but questionable to apply this phrase to an arrangement, the primary purpose of which is extending help or support by conditioning grants or other benefits under welfare or other federal assistance programs, even if the arrangement is cast in contract form.

Apart from this point, there are several legal questions which require consideration, whether the extended coverage is to be accomplished by amending the Executive order or issuing the proposed regulations. These questions arise from the fact that the power of the Executive branch to attach conditions to government grants, like its power to attach conditions to government contracts, is subject to such legal inhibitions as may stem from any applicable federal legislation prescribing the limitations, procedures and conditions which are to govern the making of such contracts or grants, either generally or in particular cases.

The first question is whether the imposition by executive action of equal employment opportunity conditions on all federal assistance agreements would conflict with the Civil Rights Act of 1964. Title VI of that Act, which seeks generally to assure equal and non-discriminatory treatment among the beneficiaries of federal assistance programs, expressly provides in section 604 that such title does not touch employment practices in the assisted activities except in limited circumstances. In addition, Title VII, which is aimed directly at discriminatory employment practices, does not apply to such practices by an agency of a State or political subdivision thereof. Such agencies are often parties to federal assistance agreements. As to

those situations where Title VII does apply, its provisions for ending discriminatory employment practices are different from those here contemplated. Although I am not prepared to conclude that the action of Congress in deliberately leaving these gaps in the antidiscrimination provisions of the Act has legally precluded executive action to fill such gaps -- indeed, I believe that it probably did not -- the legal uncertainty on this score must nevertheless be recognized.

The second legal question likely to be raised about Executive action requiring equal employment opportunity under assistance agreements stems from the numerous statutes under which the various federal assistance programs are conducted. In those programs in which the terms for granting assistance are prescribed by statute in such a manner as to create an apparent entitlement to aid whenever all the conditions of the statute have been met, there may be grounds for legal challenge to an assertion of executive discretion to attach further conditions, however desirable, that are outside the statutory scheme. While there are many assistance programs in which this kind of problem should not arise, and while an Executive order might be drafted with provisions designed to sidestep the problem wherever it may arise, this difficulty substantially reduces the value of an Executive order as a method for attaining the present objective.

As regards the choice from the standpoint of policy between an Executive order and seeking legislation, an Executive order could be expected to generate some adverse Congressional reaction on the ground that the studied limitations in the Civil Rights Act of 1964 showed a plain intent as to what the Government should and should not do in this area, regardless of whether further action by the Executive branch was legally precluded. On the other hand, an Executive order has certain obvious practical policy

advantages, particularly the expedition with which it might be issued. Other policy factors bearing on the choice of methods will probably occur to you and others who may be dealing with this matter, and I will not attempt to review them all here.

The legal considerations mentioned above are discussed more fully in the memorandum attached hereto, which was prepared in this Department. I hope that you and your staff will find it helpful in considering what further action is most likely to be fruitful. We will be glad to work with you in any way we can to advance our common goals.

Sincerely,

Attorney General

MEMORANDUM:

Re: Proposed Amendment to the Department of Labor Regulations under Executive Order No. 11246; alternative methods toward the same objective.

The question involved here is the proposal of the Secretary of Labor to amend his regulations under E. O. 11246, requiring nondiscrimination in employment by government contractors and in federally assisted construction contracts. The Secretary would expand the definition of the term "Government contract" to read:

> "any agreement or modification thereof between any contracting agency and any person for the furnishing of services or the transfer of any real or personal property, or any interest in property, or for the use of Government property, or for the extension of financial or other assistance by the Government to any program or activity. The term 'services', as used in this definition, includes, but is not limited to utility, construction, research, insurance and fund depositary activity. The term 'Government contract' does not include (1) agreements in which the parties stand in the relationship of employer and employee and (2) Federally assisted construction contracts." (60-1.3) (Emphasis supplied.) 1/

The principal thrust of the expanded definition would be to subject to nondiscrimination employment requirements agreements involving "the extension of financial or other

1/ The present definition of "Government contract" (60-1.2(h)) reads as follows:

> "'Government contract' means any binding legal agreement or modification thereof between the Government and a contractor for supplies or services, including construction, or for the use of Government property, in which the parties, respectively, do not stand in the relationship of employer and employee" (emphasis supplied).

assistance by the Government to any program or activity." The objective is to reach employment practices in federally assisted activities which cannot be controlled under Title VI of the Civil Rights Act of 1964 because of the limitations prescribed in section 604 of that Title (for example, employment practices by a university which receives an Atomic Energy research grant)2/ and which cannot be controlled under Title VII of the Act (for example, employment practices by a State or municipal agency receiving a grant, employment practices by such an agency being expressly exempted from the application of Title VII).3/

Executive Order No. 11246 applies to "every Government contract" but does not define that term. If the term is to be defined to achieve the coverage proposed, it should be accomplished by presidential amendment of Executive Order No. 11246 or by legislation, rather than by the proposed regulations. As between such an amendatory executive order and legislation, there are reasons for questioning the legality of issuing such an order, and these reasons pertain as well to the legality of the proposed regulations.

Since September 9, 1966, when these proposed regulations were first sent to the Attorney General for comment by Secretary Wirtz, the issues they present have been extensively discussed in meetings between Labor Department lawyers and Justice Department lawyers in the Civil Rights Division and Office of Legal Counsel, as well as in an

2/ Title VI provides that no person shall be excluded on the ground of race, color, or national origin from participation in the benefits of any program or activity receiving Federal financial assistance but does not authorize any action with respect to employment practices except where a primary objective of the Federal financial assistance is to provide employment.

3/ Title VII generally prohibits discrimination in employment by employers, unions, and employment agencies in areas affecting interstate commerce but does not apply to an agency of a State or a political subdivision thereof.

exchange of memoranda setting forth their respective positions. These memoranda show that plausible arguments can be advanced both for and against the legality of the proposed regulation under the present executive order, and also for and against the legality of expanding the executive order's coverage expressly to include assistance agreements. However, the case for the legality of the proposed regulations under the present executive order is, on balance, a very doubtful one, while the case for the legality of an expanded executive order designed to achieve the same objective is stronger. This is in part because the proposed regulations would be subject to serious attack not only as unauthorized by the present executive order, but also on all the same grounds which might be used to attack the legality of an amendatory executive order. These common grounds of attack will be discussed first.

The Civil Rights Act of 1964 is the chief source of the contentions which might be used to attack the legality of imposing equal employment opportunity conditions in assistance agreements, whether by the proposed regulations or an expanded executive order. Most if not all such assistance agreements are covered by Title VI of that Act, generally prohibiting recipients of assistance from discriminating among beneficiaries of the programs involved. As noted above, Section 604 of that title declares that the title does not reach employment practices of a recipient unless a primary objective of the assistance is to provide employment. This shows that Congress by Title VI sought, in general, to impose nondiscrimination only with respect to beneficiaries of federal assistance programs, not with respect to those employed by recipients in making available the benefits thus financed. However, both the express

language of Section 604 4/ and the legislative history of Title VI 5/ seem to indicate Congress did not thereby intend to disturb existing executive branch authority to deal with discrimination, such as the authority on which the executive orders against discrimination in employment on government contracts have long rested.

This long-standing authority is of course not basically statutory. It rests on the proprietary powers of the Federal government to fix the terms on which it will deal, and on the power of the Executive branch to enter into any appropriate contracts not prohibited by law in order to carry out statutes. It is probably reinforced by those parts of the Constitution which evidence a federal policy against racial discrimination. It also presupposes the voluntary consent of the other party to the contract. These same nonstatutory powers to prescribe nondiscrimination conditions would be available to the Executive branch in connection with assistance agreements, unless legal barriers exist.

The Civil Rights Act of 1964 contains another provision which also is a possible legal barrier to the proposed coverage. This is the exemption, noted above, of State and local governments from coverage under Title VII, the fair employment title of the Act. However, this in itself would

4/ Section 604 provides:

"Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment" (emphasis supplied).

5/ See statements of Congressman Celler (110 Cong. Rec. 1527 et seq. (Jan. 31, 1964)) and of Senator Pastore (110 Cong. Rec. 7058 et seq. (April 7, 1964)). See also "Nondiscrimination in Federally Assisted Programs: Legislative History and Analysis of Title VII of the Civil Rights Act of 1964" by Raymond Celada, Legislative Reference Service, Library of Congress, November 24, 1965.

not seem to interpose too serious an obstacle. Title VII was generally aimed at employment in industries affecting commerce, and its limitations thus seem to be less pertinent to the subject of the proposed regulation, employment in activities under federal assistance programs, than are the limitations in Title VI, which is directly concerned with such programs. Moreover, discrimination in employment by State and local governments is in any event covered by the Fourteenth Amendment. Finally, a substantial number of federal assistance agreements are made with parties other than State and local governments.

Apart from the Civil Rights Act of 1964, the other potential legal barrier to Executive action to require nondiscrimination in employment under assistance agreements consists of the various provisions of the numerous statutes which authorize federal assistance programs, insofar as each such statute may be construed as establishing its own framework of procedures and circumstances out of which an entitlement to assistance may arise. The seriousness of this kind of barrier cannot be accurately measured at this time on a uniform, across-the-board basis. There are literally hundreds of federal assistance programs, and in some of them Congress may well have laid down the terms for the granting of assistance, such as the necessary findings, allocations, procedures and conditions, in such a manner as to imply that the terms prescribed by the particular statute constitute the measure of the right to aid, so that additional terms of the sort here contemplated may not be made a condition of such aid.

It seems impractical for the Department of Labor or the Justice Department expeditiously to appraise this problem on a program-by-program basis, at least without the assistance of the various other departments and agencies administering such programs. However, it seems safe to assume that many assistance programs are authorized in such

language as to afford some discretion for attaching reasonable and desirable conditions of the kind here contemplated to grants of assistance. Other assistance programs could be dealt with on a case-by-case basis as problems present themselves. To facilitate such a flexible approach toward minimizing such difficulties, an amendatory Executive order might contain a brief provision to the effect that it shall not be so construed as to conflict with the requirements of any statute under which federal financial assistance is extended.

Additional problems must be faced if the proposed regulation, rather than an amendatory Executive order, is to be issued. Although the phrase "every government contract" in the present executive order might seem literally to cover assistance agreements, at least if they are legally binding,3/ the intended scope of the order does not cover such agreements, and the order has never been understood to reach them. The order is basically directed to all contracts in which the government procures goods and services. The fact that it was extended in 1963 to cover federally assisted construction contracts, which in themselves presuppose an agreement for federal assistance, shows that the order does not cover employment under federal assistance agreements.

Reference has been made, as tending to support the proposed regulations, to a letter dated January 27, 1965 and signed by the then Assistant Attorney General, Office of Legal Counsel, to the effect that certain government depositary agreements with banks are government contracts under a predecessor of the present Executive order. That letter, however, hardly supports the view that agreements for federal assistance are within the order's coverage of government contracts. Depositary agreements with banks are but another example of government procurement of services, as the letter points out.

3/ We note that the proposed definition would drop the present express requirement that the agreements covered be legally binding ones.

Moreover, in discussing depositary agreements there has no reason to consider a distinction which here seems fundamental. That is the distinction between contracts in the ordinary sense of agreements of a commercial nature, in which both parties are essentially bargaining for their own benefit, and gifts, grants or other kinds of assistance for welfare or other purposes in which both parties essentially seek the benefit of one party, or of third persons whom that party will benefit. The fact that there may be some government dealings in contract form which represent a mixture of these two basic types, the commercial and the public benefit, does not gainsay the importance of the distinction, which goes to the substance of the transaction and not to its legal form. The present Executive order as it applies to government contracts never has and does not now cover agreements of a distinctly noncommercial, public-benefit character.

Accordingly, over and above the substantial legal questions involved in covering employment under assistance programs by an amendment to Executive Order No. 11246, as previously discussed, there would be superimposed further legal difficulties of a serious nature if the proposed regulations were to be used as the method for attaining such coverage. All such legal difficulties could of course be avoided if legislation were chosen as the method for effectuating the desired coverage.

AUG 18 1972

2000-1

CC

Applicability of E.O. 11246 to Manpower Administration Programs

Norman Grant
Regional Solicitor

In accordance with your request, I am attaching our September 23, 1970 Memorandum on the above subject.

Stephen P. Feigin
Assistant Counsel for
Labor Relations and Civil Rights

Attachment

SOL:SFeigin(2259)ph
8/17/72